Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

JOSE VAZ AYRES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, as the court held below, a district court judge during the enforcement of a summons may constitutionally find an individual in contempt via the summary contempt exception to the normal due process requirements, for conduct that did not occur in *open court* and by using a summary contempt proceeding that involved not a single person aside from the solitary judge sitting in his chambers.

2. Whether the federal courts are required to apply the due process protections which are afforded in the context of a summons enforcement by this Court's decision in *Reisman v. Caplin*, 375 U.S. 440, 448-49 (1964), to improper summons enforcement conduct that occurs *after* an enforcement order has been issued, or as the federal appeals court held below, are such due process determinations precluded from being raised subsequent to the enforcement order and not until after the individual has been adjudged to be in contempt.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING CERTIORARI 10

The Ninth Circuit has so far departed from the accepted and usual Constitutional considerations in reviewing federal court contempt proceedings as to call for an exercise of this Court's supervisory power 10

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

Bisceglia v. U.S., 420 U.S. 146 (1975) 19

Cooke v. U.S., 267 U.S. 517 (1925) 10, 11, 12

Daly v. U.S., 393 F.2d 873 (8th Cir. 1968) 15, 16

In re Chandler, 906 F.2d 248 (6th Cir. 1990) 11

International Union UMWA v. Bagwell, 512 U.S. 821 (1994) 11, 12

Matter of Heathcock, 696 F.2d 1362 (11th Cir. 1983) 12

Mott v. McMahon, 214 F.Supp. 20 (D.C. Cal. 1963) 16

Penwalt Corp. v. Durand-Wayland, Inc., 708 F.2d 492 (9th Cir. 1983) 12

Pounders v. Watson, 117 S.Ct. 2359 (1997) 13

Powell v. U.S., 379 U.S. 48 (1964) 17

Reisman v. Caplin, 375 U.S. 440 (1964) ..... *passim*

Rosen v. Webster, 776 F.2d 607 (6th Cir. 1985) 11

Schleper v. Ford Mtr. Co. Auto Div., 585 F.2d 1367 (8th Cir. 1978) 12

Sunders v. Monsanto Corp., 574 F.2d 198 (5th Cir. 1978) 12

U.S. v. Bell, 448 F.2d 40 (4th Cir. 1971) 16

U.S. v. Caceres, 440 U.S. 741 (1979), revd. 454 F.2d 1192 (9th Cir. 1978) 17

U.S. v. Huene, 745 F.2d 1216 (9th Cir. 1984) 6, 16

U.S. v. Ladner, 238 F.Supp. 895 (S.D. Miss. 1965) 16

TABLE OF AUTHORITIES – Continued

Page

U.S. v. Rendahl, 746 F.2d 553 (9th Cir. 1984) 16

U.S. v. Roundtree, 420 F.2d 845 (5th Cir. 1969) 15, 16

U.S. v. Rylander, 460 U.S. 752 (1983)..... 12

U.S. v. Schmidt, 360 F.Supp. 339 (M.D. Penn. 1973) 16

STATUTES

26 U.S.C. §872(b) 3

26 U.S.C. §7210.....14, 17

26 U.S.C. §7402(b) 14

26 U.S.C. §7602.....2, 14

26 U.S.C. §7604.....2, 15, 17

26 U.S.C. §7604(a) 14, 17

26 U.S.C. §7604(b) 14, 17

26 U.S.C. §7605.....2, 7

26 U.S.C. §7605(a) 7, 8, 18

26 U.S.C. §7605(b) 7, 8, 18

28 U.S.C. §1254(1) 1, 9

OTHER AUTHORITIES

U.S. Constitution, Fourth Amendment..... 16

U.S. Constitution, Fifth Amendment..... 16

3 C *Wright and Miller*, 2nd Ed., 1995 §705..... 13

OPINIONS BELOW

United States of America v. Ayres,
Nos. 97-55780, 97-55796, 97-56041 (9th Cir. 1999)

United States of America v. Ayres, unreported,
Nos. 97-55780, 97-55796, 97-56041 (May 26, 1999)

United States of America v. Ayres, unreported,
U.S.D.C., C.D. Cal No. CV-94-00198-RT (May 22, 1997)

United States of America v. Ayres, unreported,
U.S.D.C., C.D. Cal No. CV-94-00198-RT (April 18, 1997)

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit sought to be reviewed was entered on January 28, 1999. The petition for rehearing and rehearing en banc was denied on May 26, 1999 and this petition was timely filed within 90 days as permitted by Rule 13(3).

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1), which provides that cases in the courts of appeals may be reviewed by the Supreme Court by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The following constitutional and statutory provisions appear in the appendix hereto:

26 U.S.C. §7602
26 U.S.C. §7604
26 U.S.C. §7605

STATEMENT OF THE CASE

An Internal Revenue Service ("IRS") summons was issued for the records and testimony of the Petitioner, Jose Vas Ayres ("Ayres"), a Brazilian citizen and a new employee of Varig Airlines. Ayres appeared at the noticed hearing before the IRS agent, who acts as a hearing officer under the Administrative Procedures Act ("APA"). Ayres made objections at this hearing, and no testimony was taken or records provided.

The IRS moved to enforce the summons in the United States District Court for the Central District of California. The court issued a minute order enforcing the Summons as modified for documents already in the possession of the IRS, and ruling, *inter alia*, that the Assistant U.S. Attorney (AUSA) had agreed to provide an interpreter for the summoned hearing. The minute order also found that despite the submitted exhibit of a letter from Ambassador Ribiero to the IRS Hearing Officer expressing grave concern over the IRS' action, and a statement of interest on the part of the Brazilian government regarding the summons, that the Brazilian government was not interested in the case.

Subsequently, a Statement of Sovereign Interest of the Government of Brazil was filed, requesting "that the Court defer any decision regarding the above-captioned summons enforcement until our Government has had an opportunity to consider the equivalent exemption as to U.S. airline employees and other U.S. persons similarly situated in Brazil." Also filed with the district court was a Declaration by Neil Schilling Zelmanovits, a Brazilian attorney, opining that U.S. crew members in Brazil on temporary visa were not subject to U.S. taxation there, based on reciprocal treatment for U.S. citizens in Brazil.[1] Both documents were submitted in support of Ayres' May 19, 1995, Motion for Amended and Additional Findings. In a minute order of June 22, 1995, Judge Timlin denied Ayres' motion, but held that personnel additional to the hearing officer were to be excluded from the compliance hearing. Ayres had sought this finding after the AUSA had refused the request of Ayres' attorney for an interpreter, and had threatened to have Ayres arrested instead. Judge Timlin's minute order also included the requirement that an independent interpreter be provided for Ayres.

On July 5, 1995, Ayres and his attorney Manning again appeared before the IRS hearing officer, ready to comply with the summons. Manning went through the list of requested documents, indicating which were already in the possession of the IRS, and which were nonexistent. The hearing ended without the testimony of Ayres, as the IRS had willfully disobeyed Judge Timlin's order to provide an interpreter. Ayres reasonably

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[1] *See* 26 U.S.C. § 872(b).

believed that the Summons and subsequent Enforcement Order had been complied with, as he had appeared at the time and place supplied, tendered the records, and was fully prepared to give testimony, but was unable to do so only because of the contumacious refusal of the IRS to obey Judge Timlin's order to provide an independent, qualified, interpreter.

Between July 5th and July 14th, IRS hearing officer Binda called Manning at his home despite having his business card, and left a message on his answering machine demanding dates for a continued appearance, accompanied by threats (e.g., "You've put the last nail in your coffin"). On July 14, 1995, Manning wrote to the AUSA handling the case and indicated that Ayres had already complied with the summons and Enforcement Order, but that without waiving objections, and under the fear of threatened imprisonment, Ayres offered to appear again on July 26, 27, or 28, 1995. On July 21, 1995, after a lack of response from the AUSA, Manning sent a fax inquiring about the reason for the government's lack of response to his letters.

Finally on July 21, 1995, the AUSA accepted the July 28th hearing date, and in writing, indicated that IRS Counsel was arranging a Brazilian Portuguese-English Translator. The same day, the AUSA sent a revised letter indicating that a "translation service" was intended for the July 28th hearing. On July 24, 1995, the AUSA sent a fax canceling the July 28th hearing because of "scheduling conflicts." On August 1, 1995, the AUSA wrote to Manning stating that "[t]he U.S. Attorney's office has obtained a contract for the services of an appropriate

interpreter who is available on one day's notice." As events showed, that was not a true statement.

On April 23, 1996, after an unreasonable delay of proceedings pursuant to a summons with which Ayres had already fully or at least substantially complied and which had accordingly expired, the IRS finally decided it wanted to question Ayres after all. It sent a letter to Manning by Federal Express indicating than an interpreter was available on one day's notice. After some discussion of scheduling, Manning agreed to appear with Ayres on May 24, 1996, again without waiving objections.

By telephone on May 17, 1997, the AUSA stated that the interpreter was independent, and not an IRS employee, after a specific question about that by Manning. Manning confirmed by fax the same day that "an independent interpreter in Portuguese, Brazilian dialect, should be on hand." On May 20, 1996, AUSA confirmed the availability of an independent interpreter.

Ayres had a reasonable belief that the Original Summons and its Enforcement Order (including the independent interpreter requirement) had expired due to his timely appearance, and that the Government's further demands to return were unreasonable.

On May 24, 1996, Ayres and his attorney appeared for the second time in full compliance with the Enforcement Order, but under duress, including the jail threat. The IRS once again contumaciously disobeyed Judge Timlin's Order to provide an independent interpreter. An IRS auditor, Wendy Hsu, was offered as the independent interpreter, even though the AUSA had expressed and

agreed several times that an independent contract interpreter was available on only one day's notice. At this point, Ayres felt even more strongly that finally this time, the Summons and subsequent Enforcement Order had been complied with, as he had again appeared at the time and place required, fully prepared to give testimony, but was again unable to do so because of the continued apparent bad faith, and contumacious refusal of the IRS to comply with the Court order.

The IRS also attempted to conduct the hearing without a reporter in violation of the IRS manual and due process (*see U.S. v. Huene*, 745 F.2d 1217, 1219 (9th Cir. 1984)), eventually having one called in. Manning objected to the use of the agent "interpreter" and no testimony was given by Ayres. The IRS hearing officer then served Manning with a summons directed personally against him, that inquired into privileged communications between himself and Ayres, and fees received by him from Ayres.

On May, 29, 1996, the AUSA asked for more dates. Manning asked that the AUSA agree to file a joint pleading with the court asking it to rule on whether the summons had been complied with and had expired, including the reasonableness standard of IRS §7605. This request was ignored.

On August 26, 1996, the AUSA faxed a written notice to appear in 10 days, and on the same day filed an *improper* Motion to hold Ayres in *summary* contempt, without any order to show cause being sought. This motion was denied, with a finding that the first two

appearances by Ayres had complied with the Enforcement Order, but that the examinations were not successful due to the failure of the IRS to comply with the Order to provide an interpreter.

In response and in objection to the improper motion for summary contempt proceeding, Manning raised the issue of the unreasonable circumstances, the prematurity of a claim of contempt, and asked the court to determine the expiration of the Enforcement Order and Summons under 26 U.S.C. §7605. While the Court held that Ayres had been in compliance with the Enforcement Order, and was not subject to a summary contempt conviction, it nonetheless erroneously declined to reach the issue of the expiration of the Enforcement Order and Summons, nor §§7605(a) and (b). Judge Timlin expressly left these issues open for a future determination.

Manning also raised, in connection with the USA's contempt motion, the impropriety of the USA's 10-day noticing of yet another hearing, without having first attempted to agree upon a date or getting an Order to Show Cause. The USA, seized upon this understandable inability of Ayres to attend the hearing in ten days in support of its motion for contempt. The Court, however, saw through the USA's ploy and held that the USA had presented no evidence that it had attempted to reach a mutually agreed upon date and time for the hearing.

On September 26, 1996, the AUSA again issued a 10-day notice to appear, calling for Ayres' appearance on

October 6, 1996 – a Sunday![2] Ayres appeared at the IRS offices on Sunday October 6, 1996, at the appointed time, but no IRS personnel were there to conduct a further hearing. This created the issuance of the §7605(a) violation.

On December 11, 1996, Ayres agreed to appear before the IRS a *fourth* time, on December 13, 1996, again without waiving objections. At the December 13, 1996, hearing, Manning interposed the following good faith objections which he indicated the District Court should decide before Ayres answered any questions: (1) Whether the summons had expired; (2) Whether it was unreasonable, within the meaning of 26 U.S.C. §§7605(a) and (b), to require Ayres to appear four times pursuant (including a Sunday) to the summons; and (3) Whether the USA's post-Enforcement Order conduct in harassing Ayres and Manning demonstrated that the IRS was using the summons for an improper purpose or abusing the process. All of the AUSA and the IRS' above willful acts of disobedience to Judge Timlin's Enforcement Order and the abuse of process by the IRS, et al., were referred to in the Appellate Court's decision as "procedural glitzes."

On January 15, 1997, the USA filed a second motion to hold Ayres in civil contempt without seeking a show cause order, this time based upon Ayres' prior raised, but not decided, good faith interposition of *Reisman v. Caplin*, 375 U.S. 440, 449 (1964) of good faith objections at the December 13, 1996, hearing. On January 23, 1997, Ayres

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[2] There is no admissible evidence in the record to show that this Sunday notice was for any other reason than harassment, and to be unreasonable.

filed a response to the contempt motion, including the above defenses. Ayres' lawyer Manning was going to testify so new counsel was required.

On April 21, 1997, instead of denying the contempt motion as premature and deciding the raised *Reisman* issues, Judge Timlin prematurely, summarily, and in chambers, held Ayres in civil contempt.

On appeal from the district court's finding of out of court summary contempt, the Ninth Circuit Court of Appeals upheld the summary contempt finding, but reversed the contempt fine, because the IRS had refused to allow Ayres to purge the contempt on a timely basis.

Ayres petitioned for a rehearing with the Ninth Circuit Court of Appeals, and requested a rehearing en banc. The Ninth Circuit Court of Appeals denied the petition for rehearing on May 26, 1999. This petition for certiorari to the United States Court of Appeals for the Ninth Circuit is timely filed within 90 days of the filing of the Ninth Circuit opinion on May 26, 1999. Jurisdiction is conferred upon the Supreme Court pursuant to 28 U.S.C. §1254(1).

REASONS FOR GRANTING CERTIORARI

The Ninth Circuit has so far departed from the accepted and usual Constitutional considerations in reviewing federal court contempt proceedings as to call for an exercise of this Court's supervisory power.

I. All of the contempt proceedings in this appeal were handled by Judge Timlin, alone in chambers. There were never any court appearances concerning the contempt charge, no "in-court" hearing, and no testimony from either side. The Appellate Court's opinion below not only upholds a summary contempt finding for out of court contempt allegations, but in fact establishes circuit precedence for a new form of "in-chambers" summary contempt for out of court contempt allegations. This Court has repeatedly determined that an "in-chambers" summary contempt ruling for out of court acts, cannot legally or constitutionally exist. The basis for the summary contempt exception to the required due process protections which are otherwise afforded, requires that an individual contemnor do contemptuous acts in "open court". If there has been no "open court" before the presiding district court judge, as here, than constitutionally and logically, a summary contempt finding cannot occur. The published *Ayres* opinion has now created circuit precedence which may likely become the modern trend among the circuits.

For the past 75 years, the test for contempt procedures has turned on whether the contempt occurred in court or out of court. If the contempt is in court, summary proceedings and punishment are allowable. But if the contempt occurs out of court by even a few feet, or out of the judge's sight, there can never be a summary contempt proceeding. In *Cooke v. U.S.*, 267 U.S. 517, 536 (1925), this

Court was very clear in distinguishing the fundamental principal between that contempt which occurs in court, that which occurs out of court, and the applicable hearings required for each type. With out of court contempt, there must be an evidence hearing in open court and with counsel. In *Cooke*, the judge was sitting in his chambers during a ten-minute recess when an alleged contumacious letter was delivered to him, resulting in the summary contempt hearing and punishment. Though the letter delivery was only "a few feet away" from the court room, this Court held that the action was clearly "not in open court." *Id.* at 517. This Court went on to say that:

> The contempt is not in open court there is no such right or reason in dispensing with the necessity of *charges* and the *opportunity of the accused* [to] *assistance of counsel* . . . and *the right to call witnesses* . . .

Id. at 536-537 (emphasis added). In *International Union UMWA v. Bagwell*, 512 U.S. 821, 833 (1994), this Court, citing *Cooke* said flatly and without any exception stated that "summary adjudication of indirect contempt is prohibited."

Ayres' specifically asked the Court for an opportunity to call witnesses, particularly his counsel. Ayres informed the court that he wished to retain new counsel and objected to the absence of a show cause order for the contempt. As the civil contempt proceeding is a civil action, rules including FRCP 8 apply. The Ninth Circuit went against the trend of the circuits and failed to observe this fact. *See In re Chandler*, 906 F.2d 248 (6th Cir. 1990); *Rosen v. Webster*, 776 F.2d 607, 610-11 (6th Cir.

1985); *Schleper v. Ford Mtr. Co. Auto Div.*, 585 F.2d 1367 (8th Cir. 1978); *Matter of Heathcock*, 696 F.2d 1362 (11th Cir. 1983). The Ninth Circuit has failed to follow the trend of the circuits in their application of this Court's holdings in *Bagwell* and *Cooke*.

The Appellate Court determined that submission of affidavits sufficiently protected Ayres' right to be heard in an out of court contempt. This is not a "hearing" but judgment on the pleadings. The Appellate Court failed to recognize the law of its own circuit in *Penwalt Corp. v. Durand-Wayland, Inc.*, 708 F.2d 492, 494 (9th Cir. 1983) which states:

> Penwalt's argument that the hearing requirement is satisfied by the submission of opposing memoranda is wrong. In this Circuit a civil contempt proceeding, trial within the meaning of Fed.R.Civ.P. 43(a) rather than a hearing on a motion within the meaning of Fed.R.Civ.P. 43(e)[;][*sic*] the *issues* may not be *tried* on the *basis of affidavits*.

Id. at 494 (emphasis added); *Sunders v. Monsanto Corp.*, 574 F.2d 198, 200 (5th Cir. 1978). Whether or not the facts were in dispute, the trial court was required and Ayres was entitled, to properly put on his case in defense of being held in contempt. This was similarly the case in this Court's decision in *U.S. v. Rylander*, 460 U.S. 752, 754 (1983), where before imposing contempt due to an alleged non-compliance with an IRS summons, the defendant was entitled to a trial on the merits with the right to entertain testimony.

In further expanding the allowed use of the summary contempt procedure, the Appellate Court below even

makes a determination that the contempt imposed by the trial court on Ayres was *"effectively punitive,* rather than coercive," and was imposed by the district court as such, "without following the heightened procedural requirements for such sanctions." (emphasis added).

Thus, the Ninth Circuit now holds that even when the contempt is *"effectively punitive"* which means contempt is criminal in nature, this Court has held necessitates the need for the full, heightened, criminal evidentiary hearing requirements. *See also,* 3 C Wright and Miller, 2nd Ed., 1995 §705 p. 829. A summary contempt proceeding is proper. The trend in the Ninth Circuit, as evidenced by this panel's decision, continues to oppose the reasoning of this Court's decision in *Pounders v. Watson,* 117 S.Ct. 2359 (1997), where this Court reversed the Ninth Circuit on the same issue:

> We have held the summary contempt exception to the normal due process requirements, such as a hearing, counsel, and the opportunity to call witnesses includes only charges of misconduct, in open Court, in the presence of the judge, which disturbs the Court's business where all of the essential elements of the misconduct are under the eye of the Court. . . . We have stressed the importance of confining summary contempt orders to misconduct occurring in Court.

Ayres did not commit contempt in open court. The Ninth Circuit's decision upholding summary contempt was not proper under the contested facts of Appellant's compliance, is not uniform to the Due Process protections found in the Constitution, nor is it within the decisions of the United Stated Supreme Court.

II. A finding of Contempt is premature prior to the disposition of issues and objections created after the Enforcement Order. This "pre-maturity" precludes, and acts as an absolute defense to contempt. *See Reisman v. Caplin,* 375 U.S. 440, 449, fn.8 at 448 (1964). *Reisman* is controlling and dispositive. In *Reisman,* this Court established the due process rules and procedures (including those for contempt) arising in IRS summons enforcement case. At the time *Reisman* was decided, only §7602, authorizing the issuance of an IRS summons, was in the code. *See id.* at 445. Section 7210 provided for criminal sanctions, §7402(b) granted district courts jurisdiction, and §§7604(a) and (b) authorized contempt sanctions only after a *hearing* based on "satisfactory proof." *Id.* at 448. This was the first review of these statutes, *See id.* at 445, 446-48, and *Reisman* is controlling here, because the same code sections have been applied in Ayres' case. *See id.* at 445-448.

At the time *Reisman* was decided, there were no statutes or regulations spelling out the due process procedures in this area. Instead of declaring §7602 unconstitutional on due process and constitutional grounds, this Court in *Reisman* crafted a comprehensive set of due process and equal protection procedures for use alongside the statutes. *See id.* at 448-449. The Court in *Reisman* further stated that "any appropriate grounds" could be raised in both civil and criminal contempt. *See* 449, 450.

Additionally, the *Reisman* Court noted the unconstitutional nature of forcing a witness to contest a summons issuance or appropriate objection, at the peril of contempt punishment. The Court noted on p. 445-446 that

the IRS summons issuing agent is a "hearing examiner" under the Administrative Procedures Act, and has no power to enforce or impose sanctions. The U.S. must seek an Order in the District Court to compel attendance and testimony. After any Enforcement Order requiring attendance and to give testimony any subsequent objections based on the conduct or the questions of the hearing examiner have to be determined by the District Court on a motion to compel and a subsequent order issued before any civil action can commence for contempt. Such instances include those which procedurally arise on a question-by-question basis, such as privilege, after the Enforcement hearing. *See* fn.8 at 449. Under §7604, the contempt provision applicable to the instant case, only a "default or contumacious refusal" before a hearing officer may be subject to the terms of this provision. Otherwise, the party is entitled to have the court decide his objection, with evidence and a hearing. *See id.* at 448. This Court in *Reisman* pointed out that using contempt and attachment processes against "appropriate grounds" such as the assertion of privilege, which is procedurally determined on a question-by-question basis, *after* the Enforcement Order, is "inappropriate." *See id.* at 448, fn.8.

This reasoning has been applied similarly in the other circuits as illustrated by the Fifth Circuit's opinion in *U.S. v. Roundtree*, 420 F.2d 845, 852-53 (5th Cir. 1969) (IRS Enforcement Order not appealed and held in contempt for existing objections to subsequent questions). The Court held the finality of the Enforcement Order did not waive any objection in post-enforcement proceeding. Additionally, is the Eighth Circuit's opinion in *Daly v. U.S.*, 393 F.2d 873, 878 (8th Cir. 1968) (contempt reversed

as failure to obtain stay order pending appeal did not waive those objections *except* to those specific questions yet to be asked by the revenue agent, which could be objected to on good faith grounds via a question-by-question basis when asked).

The Ninth Circuit's opinion in *Ayres* ignores and restates this Court's determination in *Reisman*, and goes against the trend of the application in the other circuits as evidenced by *Roundtree* and *Daly*. What the Ninth Circuit has attempted to eliminate, is the consideration that many of the *Reisman* type protections *do not arise procedurally*, until after the Enforcement Order. In many instances, like in a civil deposition, a subpoena may be challenged and once its validity is determined, the parties are still able to challenge questions and production on an item-by-item basis with further objections as to each item being heard by the court if needed. As this Court in *Reisman noted*, one example is an objection based on a privilege. *See U.S. v. Rendahl*, 746 F.2d 553, 554 (9th Cir. 1984); *U.S. v. Ladner*, 238 F.Supp. 895, 896 (S.D. Miss. 1965); *U.S. v. Schmidt*, 360 F.Supp. 339, 347-350 (M.D. Penn. 1973); *U.S. v. Bell*, 448 F.2d 40, 42 (4th Cir. 1971) (Fourth and Fifth Amendment).

Furthermore, certain other objections cannot be raised until objectionable conduct has occurred, after the enforcement hearing. For example, the failure by the IRS to provide proper transcription [or an interpreter] has been held to preclude a charge of contempt. *See Mott v. McMahon*, 214 F.Supp. 20, 22 (D.C. Cal. 1963); *U.S. v. Huene*, 745 F.2d 1216, 1217 (9th Cir. 1984). As this involves due process, the adoption of *Mott* is binding on the IRS.

See U.S. v. Caceres, 440 U.S. 741 (1979), rev'd. 454 F.2d 1192 (9th Cir. 1978).

The Ninth Circuit did not even acknowledge the anomaly of the situation such as this one where Ayres had refused to answer questions only *after* the Enforcement Order, and subsequent to the government's contumacious disobedience to the Enforcement Order's requirement that they provide an independent interpreter. Ayres had a valid, post-Enforcement Order, good-faith *Reisman* objection, and was entitled to have the district court rule on his objection after the hearing officers had repeatedly and contumaciously disobeyed the Enforcement Order. Yet, when Ayres raised good-faith issues of due process and §7604(a) and (b) in response to the first contempt motion by the U.S., which was denied, the district court left the §7604 and the expiration issues open.

When Ayres again went before the hearing officer and again raised the open *Reisman* objections, the government again moved for summary contempt. Ayres then again raised the above objections and the prematurity defense. At this point in the proceedings, both the prematurity of the contempt and Ayres' good-faith objections under *Reisman* were still undecided. There was no *Reisman*-required contumacious refusal.[3] The court

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[3] The IRS' repeated contumacious refusal to obey the Enforcement Order requiring the IRS to provide an outside, independent interpreter, is the type of conduct this Court has said was contempt and a crime under § 7210. *See Reisman* at pp. 448-449. This conduct also constitutes an improper purpose under *Powell v. U.S.*, 379 U.S. 48, 58 (1964). This Court said that

however, again ignored the issues and defenses and summarily held him in contempt by deciding everything in chambers. The Ninth Circuit's affirmation of this type of decision by the district court cannot be allowed to continue as the law of this circuit or become the "modern trend" in the other circuits.

The district court refused to comment on the fact that Ayres had raised a good faith *Reisman* objection under §§7605(a) and (b), and that the code's language supports the validity of Ayres' objection. The Ninth Circuit upheld this lack of insight without comment. Section 7605(a) limits the "time and place of examination" to that "reasonable under the circumstances." Section 7605(b) provides that "No taxpayer shall be subjected to unnecessary examinations or investigations." The government's repeated criminal, contumacious disobedience to the Enforcement Order is within the parameters of §§7605(a) and (b). The IRS here, post-Enforcement Order, repeatedly failed to provide the ordered interpreter. This conduct created the objections for which Ayres had been punished, and yet in this circuit, such conduct is irrelevant for a court's finding of contempt.

Under *Reisman*, contempt proceedings cannot proceed until post-enforcement created issues and good faith objections are given an opportunity to be heard first.

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the District Courts are not to permit their summons enforcement powers to be abused. One example given by this Court is "to harass the taxpayer." The post-enforcement administrative proceedings before the hearing examiner constituted a West Point type repeated hazing formations including one set on a Sunday.

Even if the contempt goes forward, the prematurity of the contempt is preserved as a valid and separate defense. *Reisman* allows an independent good faith defense arising from post-enforcement conduct can be raised. The Ninth Circuit should be required to acknowledge that Ayres' proper raising of these defenses defeated the contempt order. This Court must reverse the Ninth Circuit's affirmation of the contempt conviction and remand with instructions to resolve these still undecided issues prior to the bringing of any further civil action seeking to hold Ayres in contempt.

The conduct of the IRS in this case is in the nature of the conduct developed in recent congressional hearings concerning IRS abuse of taxpayers. In *Bisceglia v. U.S.*, 420 U.S. 146, 151 (1975) this Court said that the federal courts are suppose to protect citizens from IRS abuses. This Court acknowledges on p. 146 that the IRS can and does abuse its authority. This Court should act accordingly.

CONCLUSION

Respectfully, petitioner requests the opportunity to file a reply brief to any opposition filed with this Court by the Solicitor General. For the above following reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

E.O.C. Ord
Ord and Norman

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. JOSE VAZ AYRES, *Defendant-Appellant.*	Nos. 97-55780, 97-55796, 97-56041 D.C. No. CV-94-00198-RT OPINION

Appeals from the United States District Court
for the Central District of California
Robert J. Timlin, District Judge, Presiding

Argued and Submitted
December 10, 1998 – Pasadena, California

Filed January 28, 1999

Before: Alex Kozinski and Diarmuid F. O'Scannlain, Circuit Judges and Frank C. Damrell,* District Judge.

Opinion by Judge O'Scannlain

COUNSEL

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* The Honorable Frank C. Damrell, Jr., United States District Judge for the Eastern District of California, sitting by designation.

OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether the conduct of the subject of a summons enforcement order obtained by the Internal Revenue Service may result in contempt and fines.

I

This appeal arises out of the lengthy and somewhat inept attempts by the Internal Revenue Service ("IRS") to compel testimony and the production of documents from Jose Vaz Ayres, a Varig Airlines Pilot and Brazilian citizen with a residence in Canoga Park, California. On December 7, 1993, the IRS served a summons upon Ayres by affixing it to the door of his Canoga Park home; Ayres failed to respond. At that time (and throughout this litigation), the IRS had not determined any liability on Ayres's part, and merely sought to question Ayres regarding whether he had income taxable by the United States. On June 22, 1994, the United States filed a petition in the United States District Court for the Central District of California seeking enforcement of the summons. On May 9, 1995, the court entered a summons enforcement order requiring Ayres to appear before the IRS "at such date and time as mutually convenient to the parties" in order to "give the testimony and produce all books, records, papers, and other data demanded in the subject

summons." Ayres never appealed the district court's order enforcing the summons.[1]

Over the ensuing eighteen months, various "procedural glitches" (as the district court called them) interfered with Ayres's compliance with the enforcement order. These glitches were largely attributable to the IRS. For example, the IRS agreed to provide and to pay for an independent Portugese language interpreter. However, when Ayres appeared in response to the summons enforcement order on July 5, 1995, no interpreter was available and Ayres therefore declined to testify and to produce the requested documents. When Ayres appeared on May 24, 1996, the only interpreter provided was an employee of the IRS; Ayres again refused to testify.

Based on these refusals to testify, the United States moved the court to hold Ayres in contempt on August 26, 1996. The district court denied this contempt motion (the first of two) because Ayres had attempted to comply with the summons enforcement order and his failure to do so was attributable, at least in part, to the IRS. Ayres subsequently moved for fees as a prevailing party on the first contempt motion pursuant to 26 U.S.C. § 7430; the district court denied the fee application.

After further procedural glitches, the parties agreed that Ayres would appear before the IRS on December 13, 1996. Ayres appeared, but refused to testify or to produce

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[1] "An order enforcing an IRS summons is a final appealable order." *United States v. Vallance*, 793 F.2d 1003, 1005 (9th Cir. 1986) (citing *Reisman v. Caplin*, 375 U.S. 440, 449 (1964)).

any documents. The United States again moved the district court to hold Ayres in contempt, which motion (the second of two) was granted on April 21, 1997. The contempt order provided for a ten-day grace period in which Ayres could comply with the summons enforcement order and provided for a fine of $500 for each day that Ayres failed to comply thereafter.

Ayres waited until the last business day prior to the expiration of the grace period to attempt to schedule an appearance. The IRS responded that it could not contact the relevant officers on such short notice. Because of the IRS's asserted scheduling problems, Ayres was unable to appear until May 8, 1997, four days after the expiration of the grace period, at which time he finally complied with the summons enforcement order. The government calculated Ayres's fine to be $2,000 for late compliance. Upon Ayres's subsequent motion for declaratory relief, the district court held that the proper fine was $1,500, noting that the contempt order stated that the fine would be calculated exclusive of the day of compliance.

Ayres appeals from the district court's order holding him in contempt, the order assessing the $1,500 fine, and the order denying his application for fees.

II

Ayres first asserts that the district court erred in finding contempt and further alleges a denial of due process in making that determination.

A

"The party alleging civil contempt must demonstrate that the alleged contemnor violated the court's order by 'clear and convincing evidence,' not merely a preponderance of the evidence." *In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 10 F.3d 693, 695 (9th Cir. 1993). An alleged contemnor may defend against a finding of contempt by demonstrating a present inability to comply. *See United States v. Rylander*, 460 U.S. 752, 757 (1983); *United States v. Drollinger*, 80 F.3d 389, 393 (9th Cir. 1996); *see also Chairs v. Burgess*, 143 F.3d 1432, 1436 (11th Cir. 1998) (holding that once a prima facie showing of contempt is made, "the burden then shifts to the alleged contemnor 'to produce evidence explaining his noncompliance' "); *National Labor Relations Board v. Trans Ocean Export Packing, Inc.*, 473 F.2d 612, 616 (9th Cir. 1973) ("[O]ne petitioning for an adjudication of civil contempt does not have the burden of showing that the respondent has the capacity to comply."). "Ability to comply is the crucial inquiry, and 'a court should weigh all the evidence properly before it determines whether or not there is actually a present ability to obey.' " *Drollinger*, 80 F.3d at 393.

Here, it is clear that Ayres did not comply with the enforcement order prior to the issuance of the contempt order. The enforcement order required that he appear before the IRS, *testify*, and *produce documents*. It is undisputed that, despite the various procedural glitches, Ayres appeared before the IRS on December 13, 1996, but refused to testify or to produce any documents. Thus, the only question presented in the contempt proceedings was

whether Ayres was unable to comply. *See Chairs*, 143 F.3d at 1436.

At his December 13, 1996 appearance before the IRS, Ayres did not assert that he was unable to testify or to produce documents. Instead, Ayres objected to the presence of various parties and challenged the validity of the underlying summons and enforcement order. Similarly, in his opposition to the contempt motion, Ayres did not assert that he was unable to testify or to produce the requested documents; instead, he again challenged the validity of the underlying summons and order.

As the district court correctly recognized, Ayres's challenges to the validity of the summons and the enforcement order could not excuse his failure to comply. It is a "long-standing rule that a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy." *Rylander*, 460 U.S. at 756-57 (quoting *Maggio v. Zeitz*, 333 U.S. 56, 69 (1948) (internal quotation marks omitted)). Simply put, "[t]he only issue open to [Ayres] in defending the contempt proceeding was to show inability to then produce." *Id.* at 760.

Here, Ayres effectively conceded that the finding of contempt was warranted by failing to argue or even to assert the only defense available to him. Moreover, the record and the briefs do not reveal any reason that Ayres could not have testified when he appeared before the IRS on December 13, 1996, nor is there any evidence that Ayres could not have produced the relevant documents at that time. Thus we have little trouble concluding that the

district court did not abuse its discretion in finding Ayres in contempt.

B

A closer question is presented by Ayres's due process challenge to the procedures employed by the district court in finding him in contempt. The analysis of what process was due turns upon whether the contempt was criminal or civil in nature. Criminal contempts are designed to punish; "civil contempt sanctions, or those penalties designed to compel future compliance with a court order, are considered to be coercive and avoidable through obedience." *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 827 (1994); *see United States v. Asay*, 614 F.2d 655, 659 (9th Cir. 1980) (stating that contempts are civil where "the purpose of the relief is to compel the respondent to comply"). One of the paradigmatic civil contempt sanctions "is a per diem fine imposed for each day a contemnor fails to comply with an affirmative court order." *Bagwell*, 512 U.S. at 829. Despite Ayres's contrary assertions, the per diem fine imposed in the district court's contempt order was clearly a civil contempt sanction intended to coerce compliance, rather than to punish.

"Because civil contempt sanctions are viewed as non-punitive and avoidable, fewer procedural protections for such sanctions have been required." *Bagwell*, 512 U.S. at 831. Thus civil contempt "may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard. Neither a jury trial nor proof beyond a reasonable doubt is required." *Id.* at 827.

Ayres asserted in the district court, and continues to assert on appeal, that he was entitled to a full-blown evidentiary hearing prior to the district court's entry of the contempt order. This circuit has repeatedly held, however, that finding a party in civil contempt without a full-blown evidentiary hearing does not deny due process of law to a contemnor. *See Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1324 (9th Cir.), *cert. denied*, 119 S. Ct. 446 (1998); *Thomas, Head and Greisen Employees Trust v. Buster*, 95 F.3d 1449, 1459 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1247 (1997). In *Peterson*, we noted that "a district court ordinarily should not impose contempt sanctions solely on the basis of affidavits." 140 F.3d at 1324. We also noted, however, that where "the affidavits offered in support of a finding of contempt are *uncontroverted*, we have held that a district court's decision not to hold a full-blown evidentiary hearing does not violate due process." *Id.* (emphasis added). Thus we affirmed the finding of contempt without a full-blown evidentiary hearing. *See id.*

Similarly, in *Thomas*, we held that despite the lack of an evidentiary hearing, the "parties had ample notice and an opportunity to respond to the possibility that the court would find them in contempt." 95 F.3d at 1458. We concluded that given "the overwhelming evidence" supporting the contempt motion and the fact that the alleged contemnors "did not present any arguments which created any material issue of fact," the district court's contempt finding did not constitute a denial of due process. *Id.* at 1458-59 (quoting *Commodity Futures Trading Commission v. Premex, Inc.*, 655 F.2d 779, 782 n.2 (7th Cir. 1981)). Moreover, while the contemnors in *Peterson* were

afforded a hearing at which to argue the finding of contempt, *see* 140 F.3d at 1324, in *Thomas*, we upheld a finding of contempt reached without a hearing and based solely upon briefing by the parties, *see* 95 F.3d at 1458-59.

Here, the evidence that Ayres had failed to comply with the summons enforcement order was uncontroverted. Ayres opposed the contempt motion by challenging the validity of the summons enforcement order and by asserting that his refusal to testify or to produce documents was justified. Perforce, the validity of the underlying court order was not at issue in the contempt proceedings, and present inability to comply with the order was the only defense. Ayres thus effectively conceded the contempt motion by explaining why he *chose* not to comply, rather than asserting that he *could not* comply. Just as in *Thomas*, because Ayres "did not present any arguments which created any material issue of fact," 95 F.3d at 1459 (quoting *Premex*, 655 F.2d at 782 n.2), due process did not require an evidentiary hearing prior to a finding of contempt, *see id.*; *Morales-Feliciano v. Parole Bd. of the Commonwealth of Puerto Rico*, 887 F.2d 1, 6-7 (1st Cir. 1989) (holding that due process was afforded by finding contempt "on the papers" where there were "no disputed factual matters that required an oral proceeding").

While we do not encourage the imposition of contempt sanctions "on the papers," and while we reaffirm our admonition in *Peterson* that "a district court ordinarily should not impose contempt sanctions solely on the basis of affidavits," 140 F.3d at 1324, we conclude that because the issue of contempt was effectively uncontroverted, the procedures employed by the district court afforded Ayres notice and an opportunity to be heard

sufficient to satisfy due process. We therefore affirm the district court's finding of civil contempt.

III

Distinct from his challenge to the district court's finding of civil contempt and the procedures employed in making that determination, Ayres next asserts that the district court erred in computing his fine. Ayres does not challenge the per diem rate of $500, but rather, the assessment of that fine for three days of non-compliance.

Ayres was personally served with the contempt order on April 24, 1997; the ten day grace period provided by that order, therefore, ended on Sunday, May 4. At roughly 3:00 p.m. on Friday, May 2 (the eighth day after service), Ayres contacted the IRS to schedule an appearance for the following Monday morning, May 5. While this was outside of the grace period, the contempt order expressly provided for a per diem fine *exclusive* of the day of compliance. Thus, had Ayres complied on May 5, he would [sic] avoided the imposition of a fine.

In response to Ayres's request for a Monday, May 5 appearance, the IRS indignantly responded that it could not schedule a hearing on such short notice. Despite this, Ayres went to the IRS's offices on May 5 and offered to testify and to produce documents. The IRS refused Ayres's offer and indicated that it could not schedule an appearance by Ayres until May 8, due at least in part to the expense of providing an interpreter and reporter. Ayres, in turn, offered to return the next day with an interpreter and reporter at his own expense. The IRS also blocked this attempt to comply, and Ayres did not appear

until May 8, at which time he fully complied with the summons enforcement order.

Ayres asserted before the district court that his failure to comply with the contempt order in a timely fashion, and thus avoid any fines, was due to the IRS's dilatory tactics. In its order calculating Ayres's fine, the district court rejected Ayres's arguments and decided that, by waiting to contact the IRS, Ayres had accepted the risk that it would be unable to accommodate him within the grace period.

Civil contempt sanctions, however, are only appropriate where the contemnor is able to purge the contempt by his own affirmative act and "carries the keys of his prison in his own pocket." *Bagwell*, 512 U.S. at 828 (citations omitted). A contemnor's ability to purge civil contempt, therefore, cannot be contingent upon the acquiescence of an opposing party because such an arrangement effectively renders the contempt punitive, rather than civil. *See id.* at 829 ("[A] fine . . . is civil only if the contemnor is afforded an opportunity to purge.").

While Ayres may have procrastinated, there is no dispute that he made a timely attempt to purge his contempt by complying with the district court's order, but was frustrated by the IRS's refusal to hear his testimony or to accept his documents. By ignoring the IRS's intransigence and by imposing sanctions despite Ayres's inability to purge the contempt by his own affirmative act, the district court effectively imposed punitive, rather than coercive, contempt sanctions without following the heightened procedural requirements for such sanctions. *See generally Bagwell*, 512 U.S. at 826-31. Put most simply,

the district court abused its discretion because it fined Ayres for the IRS's delay. We therefore reverse the order assessing the $1,500 fine.

IV

Finally, Ayres appeals from the district court's denial of his motion for fees pursuant to 26 U.S.C. § 7430 as a prevailing party with respect to the district court's denial of the United States's first contempt motion. However, Ayres failed to submit supporting documentation with his application for attorneys' fees sufficient to allow the district court to determine that the fees were reasonable. He also failed to sign his declaration averring that his net worth did not exceed two million dollars. Although such forms were allegedly later submitted as errata to Ayres's reply to the government's opposition, we cannot conclude that the district court abused its discretion by ruling that it would not grant fees when the government did not have a chance to see the papers relied on before filing its opposition. We therefore affirm the district court's order denying fees.

AFFIRMED in part, and REVERSED in part. Each party shall bear its own costs.

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Petitioner, v. JOSE VAZ AYRES, Respondent,	ED CV 94-0198-RT (Mex) ORDER (1) DENYING RESPONDENT JOSE VAZ AYRES' EX PARTE APPLICATION FOR NOTICE AND HEARING ON MOTION FOR DECLARATORY RELIEF RE COMPLIANCE WITH ORDER RE ENFORCEMENT OF INTERNAL REVENUE SERVICE SUMMONS AND COMPUTATION AND LIMITATION OF CONTEMPT FINES; (2) DENYING AYRES' MOTION FOR DECLARATORY RELIEF; AND (3) COMPUTING AYRES' FINES UNDER THE APRIL 21, 1997 ORDER AS $1,500 AND ORDERING HIM TO PAY THE REMAINING $1,000 TO THE COURT (Filed May 22, 1997)

Respondent Jose Vaz Ayres' (Ayres') Ex Parte Application for Notice and Hearing on Motion for Declaratory Relief re Compliance with Order re Enforcement of Internal Revenue Service Summons and Computation and Limitation of Contempt Fines was submitted for Decision. The court, the Honorable Robert J. Timlin, has read and considered the ex parte application, as well as the Motion for Declaratory Relief re Compliance with Order re Enforcement of Internal Revenue Service Summons and Computation and Limitation of Contempt Fines (motion) and petitioner United States of America's (USA's) response to the motion. Based on the ex parte application, the motion and response, and on the documents previously filed in this action, specifically the April 21, 1997 order described below, the court concludes as follows:

I.

FACTS

On April 21, 1997, this court entered an order which provided that Ayres "pay to the United States District Court for the Central District of California, Eastern Division, 4100 Main Street, Riverside, California 92501 the sum of $500.00 per day. Payment of this daily fine, as a form of coercion, shall commence 10 days after the date this order is personally served on Ayres, and shall continue exclusive of the day Ayres provides to petitioner the items set forth in the order entered May 10, 1995, and gives the testimony demanded in the summons, which is the subject of this order.

"In the event that Ayres does not comply with this order, or in the event Ayres does not produce the required documents and give the required testimony in obedience to the court's May 10, 1995 order within 20 days from the date this order is personally served on Ayres, this court shall reconsider the remedy of a fine and will consider remanding Ayres to the custody of the United States Marshal until he produces the required documents and provides the required testimony at the examination proceedings."

Ayres was personally served with a copy of this order on April 24. The clerk of the court mailed a conformed copy of this order to Ayres' counsel, Benjamin Manning (Manning), on April 21, 1997.

On Friday, May 2, some eleven days after a copy of the order was mailed to him, and eight days after his client was personally served with the order, Manning contacted the USA's attorneys to state that Ayres would appear for examination at the Internal Revenue Service (IRS) office on Monday, May 5, 1997 at 10 a.m., and that such notice was being given to provide the government with "an adequate opportunity to provide at its expense an independent licensed qualified and neutral stenographer, and an independent licensed qualified and neutral interpreter in the Portuguese language, Brazilian dialect on May 5, 1997."

Benjamin Duncan (Duncan), an Assistant Attorney for the USA, responded by FAX, asking why Manning had waited until 3 p.m. on a Friday afternoon to try to schedule an appearance by Ayres on Monday morning, stating that he had been unable to reach either of the two

IRS agents involved in Ayres' case, Ms. Kaplan and Mr. Binda, who were on leave that day, although he had also tried to call them at their homes, and stating that he would not schedule an interpreter without knowing when the IRS employees were available.

Ayres went ahead and appeared on Monday, May 5 at the IRS office, where he was told that Binda and Kaplan did not have time to depose him on that day.

Ayres ultimately was examined by the IRS agents on May 8, 1997. On May 14, 1997, USA filed and served a notice indicating that, as of 6:30 p.m. on May 8, 1997, Ayres had complied with the order re enforcement of IRS summons as modified, and that, according to USA's computations, Ayres thus was subject to fines for four days, i.e., $2,000.

II.

ANALYSIS

By way of this ex parte application, Ayers seeks to shorten the time for a hearing on a motion the purpose of which is to: (1) excuse his failure to comply with the April 21, 1997 order within the time proscribed (and to thereby reduce the fine to which he is subject), (2) foreclose the USA from later asserting that Ayres has not complied with the April 21, 1997 order, and that he is therefore subject to ongoing fines, and (3) limit his fine to the $500 he has already paid to the clerk of the court rather than $2,000.

Ayres has failed to establish any good cause to shorten time. Contrary to Ayres' assertions, the USA cannot argue that the meter is still running, so to speak, on the $500 per day fine, having filed a notice that it considered Ayres to have complied with the order re enforcement of IRS summons, as modified, as of May 8, 1997.

Furthermore, it is apparent from Ayres' moving papers themselves, without resort to any opposition, that Ayres is not entitled to a finding that his fine should be limited to $500, rather than $2,000 computed by the USA. Ayres was personally served with the order on April 24, 1997. A copy of the order was mailed by the court clerk to Manning on April 21, 1997. Faced with the knowledge that daily fines would begin on the tenth day after personal service of the order on Ayres if Ayres had not yet complied with the terms of the order, a **reasonable** attorney **promptly** would have contacted opposing counsel to schedule the examination within that 10 day period. The tenth day was Sunday, May 4, 1997. There is no evidence[1] that explains why Manning and Ayres waited until May 2, 1997, to schedule Ayres deposition for May 5, 1997. Thus, there is no evidence from which the court might conclude that, through no fault of his own, Ayres was unable to arrange to be examined within the 10 day period.

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[1] The court notes that in argument, Manning states that he was not served with the order. However, there is no declaration to this effect, and the court's files show that the clerk of the court mailed a copy of the order to Manning on April 21, 1997. Furthermore, neither in argument nor in a declaration does Manning state that he never received the order, or that Ayres never contacted him about it after being personally served.

It appears from Exhibit H to the motion that Ayres has already paid $500 in sanctions. According to the court's calculations, Ayres is liable for the fine of $500 per day for three days, not four, given that (1) Ayres had until Sunday, May 4, 1997 to submit to the required examination, (2) he was examined and produced documents on May 8, 1997, (3) the April 21, 1997 order provided that the fine "shall continue exclusive of the day Ayres provides to petitioner the items set forth in the order entered May 10, 1995," and (4) May 5, 6 and 7 were the days on which he was therefore subject to fine for failure to submit to the IRS examination and deliver to it the requested documents.

III.

DISPOSITION

No good cause appears to justify granting Ayres' ex parte application for an order shortening time. Therefore, Ayres' ex parte application for an order shortening time is DENIED.

Ayres' Motion for Declaratory Relief re Compliance with Order re Enforcement of Internal Revenue Service Summons and Computation and Limitation of Contempt Fines is DENIED.

Ayres is ordered to pay to the United States District Court for the Central District of California, Eastern Division, 4100 Main Street, Riverside, California 92501 $1,500 on or before June 6, 1997; such sum represents the total of

the remaining fines against Ayres pursuant to the April 21, 1997 order.

May 22, 1997
DATE

/s/ Robert J. Timlin
ROBERT J. TIMLIN,
DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Petitioner, v. JOSE VAZ AYRES, Respondent,	ED CV 94-0198-RT (Mcx) ORDER (1) GRANTING PETITIONER UNITED STATES OF AMERICA'S MOTION TO HOLD RESPONDENT JOSE VAZ AYRES IN CIVIL CONTEMPT AND (2) DENYING RESPONDENT'S REQUEST FOR A STAY PENDING APPEAL (Filed Apr. 18, 1997)

Petitioner United States of America's (USA's) motion to hold respondent Jose Vaz Ayres (Ayres) in civil contempt was submitted for decision. The court, the Honorable Robert J. Timlin, has read and considered the moving, opposing and reply papers.

I.

PROCEDURAL BACKGROUND

This court ordered Ayres to appear before . . . any authorized employee of the [IRS] . . . at such date and time as mutually convenient to the parties, or if the parties cannot agree on a date, then at such time and date as set by the government on ten days written notice to respondent. At his appearance respondent shall give the testimony and produce all books, records, papers and

other data demanded in the subject summons, . . . " (Order re Enforcement of Internal Revenue Service Summons, filed May 9, 1995, entered May 10, 1995, as modified by court order, filed June 22, 1995 (hereinafter May 10, 1995 order).)

By order dated June 22, 1995, this court granted respondent's application for an injunction and ordered that no U.S. Department of Justice representative could be present during the proceedings where Ayres testified and produced the required documents.

After various procedural glitches, USA and Ayres managed to agree that Ayres would appear before the IRS on December 13, 1996. Ayres specifically noted in connection with the agreement to appear that he was not waiving any objections, and that the appearance was only out of deference to the court. See Exhibit No. 116 to USA's Motion.

Ayres appeared for the examination proceedings on December 13, 1996, but refused to testify or produce any records. Instead, he raised the following objections:

(1) the presence of Steven Roth, district counsel for the IRS, as well as the presence of anyone but the hearing officer, the interpreter, and the stenographer, for which objection he cited *Reisman v. Caplin*, 375 U.S. 440 (1964), and this court's order enforcing the summons, which stated that respondent was to appear before Revenue Agent Marianna Kaplan or any authorized employee of the IRS, with Ayres' placing emphasis on the singular term "employee";

(2) a desire to have the court decide whether the summons has expired; and

(3) a desire to have this court determine whether it is unreasonable to require Ayres to appear four times, with the underlying point being that the conduct involved in requiring four appearances shows that the investigation is being conducted for an improper purpose. See Exhibit No. 118 to USA's Motion.

II.

ANALYSIS

Despite Ayres' contentions to the contrary, this motion to hold him in civil contempt for failing to comply with this court's May 10, 1995 order is proper. *International Union, Mine Workers of America v. Bagwell*, 512 U.S. 821, ___, 114 S.Ct. 2552, 2556-57, 129 L.Ed.2d 642 (1994). This motion does not depend on testimony by Mr. Benjamin C. Manning, Ayres' counsel, or any other witness; the only issue is whether Ayres is presently unable to comply with the court's order. *U.S. v. Rylander*, 460 U.S 752, 755, 103 S.Ct. 1548, 1552, 75 L.Ed.2d 521 (1983).

None of the objections raised by Ayres on December 13, 1996 related to his inability to comply with the order that he produce records and testify. None of the arguments contained in his response to USA's motion to hold him in civil contempt relate to his inability to comply with the May 10, 1995 order that he produce records and testify.

If Ayres thought that this court's May 10, 1995 order to produce records and testify was no longer valid, he

would have been well-advised to seek a court order to that effect before testing its validity by refusing to comply with it. " 'It would be a disservice to the law if we were to depart from the long-standing rule that a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy. The procedure to enforce a court's order commanding or forbidding an act should not be so inconclusive as to foster experimentation with disobedience.' [Citation.]" *U.S. v. Rylander*, 460 U.S. at 756-57, 103 S.Ct. at 1552. Ayres did not comply with the May 10, 1995 order, and he did not, and has not, demonstrated that he was unable to comply with the order, only that he chose not to comply with it.

Federal courts possess the inherent authority to enforce compliance with their orders. *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 31 S.Ct. 492, 501 (1911) (*Gompers*); *Gifford v. Heckler*, 741 F.2d 263, 265 (9th Cir.1984). The power to hold a person in contempt is delineated by statute:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as –

. . . (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. 18 U.S.C. § 401. The Court has wide latitude in determining whether a party has acted in contempt of its orders. *Gifford v. Heckler*, 741 F.2d at 266.

The civil contempt power exists to permit the Court to deal with two situations. First, it allows the Court to

coerce an intransigent party to comply with Court orders. Second, the Court may use its civil contempt power to force a disobedient party to compensate innocent parties for the damages caused by its noncompliance with the Court's orders. *General Signal Corp. v. Donallco, Inc.*, 787 F.2d 1376, 1380 (9th Cir.1986). Punitive sanctions are imposed on noncomplying parties only in the exercise of the criminal contempt power. *Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc.*, 877 F.2d 787, 788 (9th Cir.1989).[1]

There are three basic elements necessary for a prima facie showing of civil contempt. First, there must be a valid court order that is clear in its commands. *Balla v. Idaho State Board of Corrections*, 869 F.2d 461, 465 (9th Cir.1989) (court order must be "specific and definite"). Second, there must be actual notice to the parties of the terms of the order. Fed.R.Civ.P. 65(d). Third, the party must have violated the order. *General Signal Corp. v. Donallco, Inc.*, 787 F.2d at 1379; *U.S. v. Rylander*, 656 F.2d 1313, 1318 (9th Cir.1981), *rev'd on other grounds*, 460 U.S. 752 (1983). There is no requirement that a violation be willful. *U.S. v. Laurins*, 857 F.2d 529, 534 (9th Cir.1988), *cert. denied*, 492 U.S. 906 (1989); *Perry v. O'Donnell*, 759

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[1] Ayres is wrong when he contends that there must be an evidentiary hearing before this court either can apply monetary incentive to coerce his compliance or order him to compensate USA for damages caused by his noncompliance. Because this is a civil, not criminal, contempt proceeding, all that is necessary is notice and an opportunity to be heard, both of which have been provided by this motion. *International Union, UMWA v. Bagwell*, 512 U.S. 821, ___, 114 S.Ct. 2552, 2556-2557, 129 L.Ed.2d 642 (1994).

F.2d 702, 705 (9th Cir.1985) (comparing civil contempt to criminal contempt, where specific intent is required); *Donovan v. Mazzola*, 716 F.2d 1226, 1240 (9th Cir.1983) ("Intent is not an issue in civil contempt proceedings. The sole question is whether a party complied with the district court order") (citations omitted).

The party seeking a finding of civil contempt has the burden of proving a prima facie case. *U.S. v. Rylander*, 460 U.S .at 758-59, 103 S.Ct. at 1553-54. The prosecuting party must present clear and convincing evidence that the defending party had notice of the court order and that the order was violated. *Id; Vertex Distributing, Inc. v. Falcon Foam Plastics, Inc.*, 689 F.2d 885, 889 (9th Cir.1982) (noting that this is a higher standard than preponderance of evidence standard used in most civil cases). Once a prima facie case has been established, the burden of proof shifts to the defending party to establish any defenses it might raise. *See, e.g., Donovan v. Mazzola*, 716 F.2d at 1240 (considering inability to comply defense). The burden primarily consist of a burden to produce evidence supporting the defense. Once "detailed evidence" has been produced, the burden of persuasion on these defenses shifts back to the prosecuting party. *U.S. v. Rylander*, 460 U.S. at 758-59, 103 S.Ct. at 1553-54.

The Court has discretion in its choice of remedies for a civil contempt. The measure of the contempt power is determined by the requirements of full remedial relief, so the Court can take whatever action is necessary to remedy the contempt. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949). Whatever the relief that is given, the Court must give reasons for its choice of remedy. *Shuffler v. Heritage Bank*, 720 F.2d 1141, 1147 (9th Cir.1983).

Three remedies are commonly available to the Court. First, the Court has the power to jail a disobedient party. Incarceration can only be used to coerce the party to comply with a court order: once the party complies, he must be released. *See Gompers*, 221 U.S. at 440-41, 31 S.Ct. at 498 (noting that civil contemnor "holds the keys of his prison in his own pocket"); *Lambert v. Montana*, 545 F.2d 87, 91 (9th Cir.1976). If the incarceration only serves to punish the party, the punishment is considered one for criminal contempt. *Gompers*, 221 U.S. at 440-41, 31 S.Ct. at 498.

Second, the Court may impose fines on a party. These fines can be used either to coerce compliance with a court order or to compensate an injured party for the damages caused by the contumacious party's failure to comply. When the fines are imposed as a form of compensation, they are paid to the injured party. *See, e.g., In re Crystal Palace Gambling Hall, Inc.*, 817 F.2d 1361, 1366 (9th Cir.1987); *General Signal Corp. v. Donallco, Inc.*, 787 F.2d at 1380. The Court has discretion to impose compensatory fines only if the injured party has presented specific evidence of actual losses directly caused by the violation of the court order. *Id.* (vacating monetary fine because plaintiff failed to present evidence of actual monetary loss); *Shuffler v. Heritage Bank*, 720 F.2d at 1148 (requiring evidence to be specific). If an injured party can show in detail actual losses caused by the violation, then the Court is required to impose a fine on the noncomplying party. *Vuitton et Fils, S.A. v. Carousel Handbags*, 592 F.2d 126, 130 (2nd Cir.1979).

Third, the Court may award attorneys' fees, court costs, and discovery costs to an injured party that has

pursued a contempt judgment. *Perry v. O'Donnell*, 759 F.2d 702, 705 (9th Cir. 1985) (attorneys' fees and expenses). Although some circuits appear to require that a violation of the order be willful in order for attorneys fees to be awarded, *see, e.g., International Brotherhood of Teamsters, etc. v. Western Pennsylvania Motor Carriers Ass'n*, 660 F.2d 76, 84 (3rd Cir.1981), this is not the rule in the Ninth Circuit. *See Perry v. O'Donnell*, 759 F.2d at 704.

Here, USA has met its burden of establishing by clear and convincing evidence a prima facie case. There was a valid court order, which was specific and definite.[2] Ayres had actual notice of the May 10, 1995 order and its terms. Ayres violated the order by refusing to produce the documents and by failing to testify at the examination proceedings. Ayres has failed to carry his burden of showing that he was unable to comply with the order. The court therefore finds and adjudicates respondents to be in civil contempt of court for his failure set forth above to obey the court's order entered May 10, 1995, as modified on June 22, 1995, enforcing the Internal Revenue Services administrative summons at issue herein.

USA did not ask for attorneys fees and expense to reimburse it for any losses it has suffered as a result of Ayres' violation of this court's order. Instead, it has asked that Ayres be incarcerated until he complies. The court has considered (1) the character and magnitude of the

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[2] The May 10, 1995 order did not state that the IRS could not be represented by counsel at the examination proceedings, nor did it state that there was a restriction on who could be present, other than that a representative from the department of Justice could not attend.

harm threatened by Ayres' continued refusal to obey the May 10, 1995 order; (2) the possible remedies available to the court to force Ayres to comply; and (3) the probable effectiveness of the available remedies to bring about the desired compliance. Based on such consideration, the court concludes that a daily fine of $500, to commence following a 10 day grace period within which Ayres may comply with the May 19, 1995 order, followed by possible incarceration if the fine is not effective coercion, is an appropriate remedy.

Ayres has requested a stay, pending appeal, of any order holding him in contempt, citing *Mott v. MacMahan*, 214 F.Supp. 20 (D.C.Cal. 1963). the basis for his request of a stay is his assertion that there is a substantial likelihood that he would succeed on the merits of an appeal.

Mott v. MacMahon did not involve a stay. A request for a stay in an opposition is not the proper procedural method for seeking a stay pending appeal. *See* Federal Rules of Appellate Procedure, Rule 8. Nor is an assertion of a substantial likelihood of success on the merits a sufficient basis upon which to grant such a request. *See e.g., Securities Investor Corp. v. Blinder et al.*, 962 F.2d 960, 968 (10th Cir. 1992). Therefore, Ayres' request for a stay will be denied without prejudice.

III.

DISPOSITION

Accordingly, the court orders that Jose Vaz Ayres pay to the United States District Court for the Central District of California, Eastern Division, 4100 Main Street, Riverside, California 92501 the sum of $500.00 per day. Payment

of this daily fine, as a form of coercion, shall commence 10 days after the date this order is personally served on Ayres, and shall continue exclusive of the day Ayres provides to petitioner the items set forth in the order entered May 10, 1995, and gives the testimony demanded in the summons, which is the subject of this order.

In the event that Ayres does not comply with this order, or in the event Ayres does not produce the required documents and give the required testimony in obedience to the court's May 10, 1995 order within 20 days from the date this order is personally served on Ayres, this court shall reconsider the remedy of a fine and will consider remanding Ayres to the custody of the United States Marshal until he produces the required documents and provides the required testimony at the examination proceedings.

Petitioner is ordered to cause Jose Vaz Ayres to be personally served with a copy of this order.

The clerk of the court shall cause Ayres' counsel to be served with a conformed copy of this order by mail.

Ayres' request for a stay of this order pending appeal is denied without prejudice.

4/18/97
DATE

/s/ Robert J. Timlin
ROBERT J. TIMLIN,
DISTRICT COURT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOSE VAZ AYRES, Defendant-Appellant.	Nos. 97-55780, 97-55796, 97-56041 D.C. No. CV-94-00198-RT ORDER (Filed May 26, 1999)

Before: KOZINSKI and O'SCANNLAIN, Circuit Judges and DAMRELL,* District Judge

The panel has unanimously voted to deny the petition for rehearing. Judge Kozinski and Judge O'Scannlain have voted to deny the petition for rehearing en banc. Judge Damrell recommends that the petition for rehearing en banc be denied.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are denied.

* The Honorable Frank C. Damrell, Jr., United States District Judge for the Eastern District of California, sitting by designation.

§ 7602. Examination of books and witnesses

(a) Authority to summons, etc. – For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized –

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or

any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

(b) Purpose may include inquiry into offense. – The purposes for which the Secretary may take any action described in paragraph (1), (2), or (3) of subsection (a)

include the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws.

(c) No administrative summons when there is Justice Department referral. –

(1) Limitation of authority. – No summons may be issued under this title, and the Secretary may not begin any action under section 7604 to enforce any summons, with respect to any person if a Justice Department referral is in effect with respect to such person.

(2) Justice Department referral in effect. – For purposes of this subsection –

(A) In general. – A Justice Department referral is in effect with respect to any person if –

(i) the Secretary has recommended to the Attorney General a grand jury investigation of, or the criminal prosecution of, such person for any offense connected with the administration or enforcement of the internal revenue laws, or

(ii) any request is made under section 6103(h)(3)(B) for the disclosure of any return or return information (within the meaning of section 6103(b)) relating to such person.

(B) Termination. – A Justice Department referral shall cease to be in effect with respect to a person when –

(i) the Attorney General notifies the Secretary, in writing, that –

(I) he will not prosecute such person for any offense connected with the

administration or enforcement of the internal revenue laws,

(II) he will not authorize a grand jury investigation of such person with respect to such an offense, or

(III) he will discontinue such a grand jury investigation,

(ii) a final disposition has been made of any criminal proceeding pertaining to the enforcement of the internal revenue laws which was instituted by the Attorney General against such person, or

(iii) the Attorney General notifies the Secretary, in writing, that he will not prosecute such person for any offense connected with the administration or enforcement of the internal revenue laws relating to the request described in subparagraph (A)(ii).

(3) Taxable years, etc., treated separately. – For purposes of this subsection, each taxable period (or, if there is no taxable, period, each taxable event) and each tax imposed by a separate chapter of this title shall be treated separately.

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§ 7604. Enforcement of summons

(a) Jurisdiction of district court. – If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in

which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) Enforcement. – Whenever any person summoned under section 6420(e)(2), 6421(g)(2), 6427(j)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

(c) Cross references. –

(1) Authority to issue orders, processes, and judgments. –

For authority of district courts generally to enforce the provisions of this title, see section 7402.

(2) Penalties. –

For penalties applicable to violation of section 6420(c)(2), 6421(g)(2), 6427(j)(2), or 7602, see section 7210.

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§ 7605. Time and place of examination

(a) Time and place. – The time and place of examination pursuant to the provisions of section 6420(e)(2), 6421(g)(2), 6427(j)(2), or 7602 shall be such time and place as may be fixed by the Secretary and as are reasonable under the circumstances. In the case of a summons under authority of paragraph (2) of section 7602, or under the corresponding authority of section 6420(e)(2), 6421(g)(2), or 6427(j)(2), the date fixed for appearance before the Secretary shall not be less than 10 days from the date of the summons.

(b) Restrictions on examination of taxpayer. – No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

(c) Cross reference. –

For provisions restricting church tax inquiries and examinations, see section 7611.